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were prevented from completing the grading and construction of a railroad within the time required by their respective contracts, would not prevent the principal contractor from recovering damages of a particular subcontractor for breach of his contract to complete his part of the work within the required time, caused by a fire damaging his equipment; the express words of the contract making time of the essence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409-1443; Dec. Dig. § 303.* See also 3 Va.-W. Va. Enc. Dig. 421, 434.]

Appeal from Circuit Court, Roanoke County.

Action by William H. Quigg against Sands & Oliver, in which defendants set up a counterclaim. From a judgment for plaintiff in part, without allowing defendants' counterclaim, defendants appeal. Reversed and rendered.

Wilson & Manson, for appellants.

Hall, Woods & Jackson, for appellee.

Note.

The court evidently was thinking of recoupment and not true set-off, as the distinguishing feature of set-off is that both demands must be in the nature of debts, and unliquidated damages cannot be set off. The provisions of § 3299, providing for a special plea of equitable set-off, did not affect the status of common-law, recoupment. See *Columbia Accident Ass'n v. Rockey*, 93 Va. 678, 25 S. E. 1009.

COMMONWEALTH v. GLEASON et al.

Nov. 17, 1910.

[69 S. E. 448.]

1. Officers (§ 66*)—Qualifications—Removal—Grounds—Accepting Pass.—Section 161 of the Constitution of Virginia of 1902 (Code 1904, p. cclix) prohibits transportation companies from giving any frank, free, pass, free transportation, etc., to any state, county, district, or municipal officer, etc.; any officer accepting the same forfeiting his office thereby. A councilman of the city of C. was also an employee of a railway company, and from them received passes, which were given in consideration of his services and as a part payment for employment. Held, that his acceptance of such passes was not prohibited by the Constitution.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 66.* See also, 11 Va.-W. Va. Enc. Dig. 493, et seq.]

2. Officers (§ 66*)—Removal—Grounds—"Free Pass."—A "free pass," within Const. 1902, § 161 (Code 1904, p. cclix), prohibiting any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

state, county, district, or municipal officer from accepting a free pass, under penalty of forfeiture of his office, is "one which is not gained by importunity or purchase; gratuitous."

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 66.* See also, 11 Va.-W. Va. Enc. Dig. 493, et seq.]

For other definitions, see Words and Phrases, vol. 3, p. 2967.]

3. Officers (§ 66*)—Removal—Grounds—"Frank."—The word "frank," as used in section 161 of the Constitution of 1902 (Code 1904, p. cclix), prohibiting any state, county, district, or municipal officer from accepting a frank, free pass, or free transportation, is construed in section 153 (p. ccxliv) to mean a writing or token issued by a transmission company entitling the holder to some service free of charge.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 66.* See also, 11 Va.-W. Va. Enc. Dig. 493, et seq.]

Error to Circuit Court of City of Clifton Forge.

Information in the nature of quo warranto by the Commonwealth, by the Commonwealth Attorney, against J. A. Gleason and others. From a judgment for defendants, relator brings error. Affirmed.

The Attorney General and *John W. Bear*, for the Commonwealth.

John A. Boveles, *O. B. Harvey*, *J. M. Perry*, and *R. L. Parrish*, for defendants in error.

CATES v. COMMONWEALTH.

Nov. 30, 1910.

[69 S. E. 520.]

1. Indictment and Information (§ 191*)—Conviction of Lesser Offense—When Justified.—To justify a conviction of a minor offense on an indictment for another offense, the minor offense must be an ingredient of the offense charged.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 604-621; Dec. Dig. § 191.* 7 Va.-W. Va. Enc. Dig. 420.]

2. Criminal Law (§ 44*)—Intent to Commit Felony—"Attempt."—An intention to commit a felony, and the doing of some act towards its commission, without actually committing it, is an "attempt."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 51;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.